

<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>4</sup> The facts and circumstances set forth in the Board's prior decision and order are incorporated herein by reference. The relevant facts are as follows.

On June 9, 2015 appellant, then a 57-year-old financial analyst, filed a traumatic injury claim (Form CA-1) alleging that on February 20, 2015 he tripped on a strip of concrete when walking between the first and second floors of the employing establishment parking garage and "flew" forward, head first, into a concrete staircase, while in the performance of duty. He alleged that, as a result, he sustained a large bruise on his upper right arm and skinned both knees. Appellant also experienced a sore right thigh, forearm cramps, soreness in his back, and tingling in his right hand and fingers.

After initial development, by decision dated July 28, 2015, OWCP denied appellant's claim, finding that he had not established that the February 20, 2015 incident occurred as alleged. Appellant was also advised that he had not submitted any medical evidence containing a medical diagnosis causally related to the alleged incident.

On June 7, 2016 appellant, through counsel, requested reconsideration and submitted additional evidence in support of his request.

By decision dated August 24, 2016, OWCP denied modification of the July 28, 2015 decision. It found that appellant had not responded to its June 25, 2015 letter to establish the factual component of his claim.

On October 20, 2016 appellant, through counsel, appealed to the Board. By decision dated August 3, 2017,<sup>5</sup> the Board affirmed OWCP's August 24, 2016 decision, as modified. The Board found that the evidence submitted was sufficient to establish that the incident occurred as alleged. However, the Board found that appellant had not submitted sufficient medical evidence to establish that the accepted employment incident caused or contributed to a diagnosed medical condition and resultant employment injury.

OWCP subsequently received additional medical evidence.

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<sup>4</sup> Docket No. 17-0086 (issued August 3, 2017); *Order Remanding Case*, Docket No. 19-1957 (issued June 22, 2020).

<sup>5</sup> *Id.*

In reports dated March 1 and April 7, 2016, Dr. Michael E. Goldsmith, a Board-certified orthopedic surgeon, reviewed diagnostic testing, provided examination findings, and diagnosed low back pain, lumbar region intervertebral disc degeneration, and status post lumbar fusion.

On August 7, 2018 appellant, through counsel, requested reconsideration. The following evidence was submitted in support of his request.

In a report dated November 3, 2015, Dr. Goldsmith related that appellant was seen that day for bilateral leg and low back pain. In his report, he provided examination findings, reviewed diagnostic tests, and detailed a history of injury, noting that appellant developed severe right leg pain following a fall in February 2015. Dr. Goldsmith diagnosed lumbago and lumbar pseudarthrosis and spinal stenosis.

A February 15, 2016 operative report from Dr. Goldsmith, diagnosed lumbar pseudarthrosis with L4-5 and L5-S1 degenerative disc disease. Appellant underwent surgery wherein L4-S1 hardware was removed followed by posterior L5-S1 spinal fusion.

In an October 24, 2017 report, Dr. Goldsmith noted that appellant was seen for complaints of neck pain. He noted a 1995 motor vehicle accident and that appellant complained of increased neck discomfort while clearing rocks on September 10, 2016. Examination and diagnostic test findings and medical history were detailed. Dr. Goldsmith diagnosed cervical spinal stenosis, cervical disc degeneration, and cervical disc displacement.

In reports dated February 20 and March 20, 2018, Dr. Goldsmith, diagnosed low back pain, cervical disc degeneration with spinal stenosis, cervical disc displacement, cervicgia, peripheral neuropathy, and two years status post lumbar fusion. He detailed appellant's medical history, reviewed diagnostic tests, and provided examination findings.

By decision dated August 1, 2019, OWCP denied modification, finding that the medical evidence of record was insufficient to establish causal relationship between the diagnosed medical conditions and the accepted February 20, 2015 employment incident.

On September 24, 2019 appellant, through counsel, filed an appeal with the Board. By order dated June 22, 2020, the Board set aside the August 1, 2019 decision, finding that OWCP erroneously applied the standard of review for timely requests for reconsideration.<sup>6</sup> The Board remanded the case for application of appropriate standard for untimely requests for reconsideration.

By decision dated August 14, 2020, OWCP denied appellant's August 7, 2018 request for reconsideration finding that it was untimely filed and failed to demonstrate clear evidence of error.

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<sup>6</sup> *Supra* note 4.

## **LEGAL PRECEDENT**

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.<sup>7</sup> This discretionary authority, however, is subject to certain restrictions.<sup>8</sup> OWCP's regulations establish a one-year time limitation for requesting reconsideration, which begins on the date of the original OWCP merit decision.<sup>9</sup> A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>10</sup> Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the integrated Federal Employees' Compensation System (iFECS).<sup>11</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>12</sup>

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.<sup>13</sup> If a request for reconsideration demonstrates clear evidence of error, OWCP will reopen the case for merit review.<sup>14</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP.<sup>15</sup> The evidence must be positive, precise, and explicit, and must manifest on its face that OWCP committed an error.<sup>16</sup> Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.<sup>17</sup> It is not enough merely to demonstrate that the evidence could be construed

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<sup>7</sup> *Supra* note 3 at § 8128(a); *see P.A.*, Docket No. 20-0061 (issued January 29, 2021); *B.W.*, Docket No. 19-0626 (issued March 4, 2020); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

<sup>8</sup> 20 C.F.R. § 10.607(a).

<sup>9</sup> *Id.* at § 10.607(a); *T.T.*, Docket No. 19-1624 (issued October 28, 2020); *V.G.*, Docket No. 19-0038 (issued June 18, 2019); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Alberta Dukes*, 56 ECAB 247 (2005).

<sup>10</sup> *J.W.*, *id.*; *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

<sup>12</sup> *A.M.*, Docket No. 20-0143 (issued October 28 2020); *S.T.*, Docket No. 18-0925 (issued June 11, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>13</sup> *See supra* note 8 at § 10.607(b); *G.B.*, *supra* note 6; *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499 (1990).

<sup>14</sup> *Y.J.*, Docket No. 18-0495 (issued December 10, 2019); *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010); *supra* note 8 at § 10.607(b); *supra* note 11 at Chapter 2.1602.5 (February 2016).

<sup>15</sup> *P.A.*, *supra* note 7; *W.H.*, Docket No. 20-0395 (issued October 23, 2020); *S.T.*, *supra* note 12; *Darletha Coleman*, 55 ECAB 143 (2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>16</sup> *Y.J.*, *supra* note 6; *R.C.*, Docket No. 18-1441 (issued October 21, 2019); *S.T.*, *supra* note 12.

<sup>17</sup> *P.A.*, *supra* note 7; *L.B.*, Docket No. 19-0635 (issued August 23, 2019); *V.G.*, *supra* note 9; *Leon J. Modrowski*, 55 ECAB 196 (2004).

so as to produce a contrary conclusion.<sup>18</sup> This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.<sup>19</sup> To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.<sup>20</sup> The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.<sup>21</sup>

Section 8124(a) of FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.<sup>22</sup> Section 10.126 of Title 20 of the Code of Federal Regulations provides that a decision shall contain findings of fact and a statement of reasons.<sup>23</sup> The Board has held that the reasoning behind OWCP's evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.<sup>24</sup>

### ANALYSIS

The Board finds that this case is not in posture for decision.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the timeliness of appellant's August 7, 2018 reconsideration request as the Board considered the evidence relative to that issue in the June 22, 2020 order. Findings made in prior Board decisions and orders are *res judicata* absent any further review by OWCP, under section 8128 of FECA.<sup>25</sup>

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<sup>18</sup> *P.A.*, *supra* note 7; *W.H.*, *supra* note 15; *V.G.*, *supra* note 9; *see E.P.*, Docket No. 18-0423 (issued September 11, 2018); *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>19</sup> *P.A.*, *supra* note 7; *L.B.*, *supra* note 17; *V.G.*, *supra* note 9; *see E.P.*, *id.*; *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>20</sup> *D.G.*, Docket No. 18-1038 (issued January 23, 2019); *Leon D. Faidley, Jr.*, *supra* note 12.

<sup>21</sup> *I.A.*, Docket No. 19-1910 (issued September 29, 2020); *W.R.*, Docket No. 19-0438 (issued July 5, 2019); *C.Y.*, Docket No. 18-0693 (issued December 7, 2018).

<sup>22</sup> *Supra* note 3 at § 8124(a).

<sup>23</sup> *Supra* note 2 at 10.126.

<sup>24</sup> *K.W.*, Docket No. 19-0808 (issued April 2, 2020); *L.M.*, Docket No. 13-2017 (issued February 21, 2014); *D.E.*, Docket No. 13-1327 (issued January 8, 2014); *L.C.*, Docket No. 12-0978 (issued October 26, 2012); Federal (FECA) Procedure Manual Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5 (February 2013) (all decisions should contain findings of fact sufficient to identify the benefit being denied and the reason for the disallowance).

<sup>25</sup> *C.M.*, Docket No. 19-1211 (issued August 5, 2020); *J.T.*, Docket No. 18-1757 (issued April 19, 2019).

On August 13, 2020 OWCP summarily denied appellant's request for reconsideration without complying with the review requirements of FECA and its implementing regulations.<sup>26</sup> As noted above, section 8124(a) of FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.<sup>27</sup> Its regulations at 20 C.F.R. § 10.126 provide that the decision of the Director of OWCP shall contain findings of fact and a statement of reasons.<sup>28</sup> As well, OWCP's procedures provide that the reasoning behind OWCP's evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.<sup>29</sup> In the August 14, 2020 decision, OWCP denied appellant's August 7, 2018 reconsideration request, finding it was untimely filed as it was received more than a year following the most recent merit decision, which was a Board decision dated August 3, 2017, but failed to analyze the evidence or argument as to whether it was sufficient to demonstrate clear evidence of error. It noted that new medical evidence accompanied appellant's reconsideration request and summarily concluded that the evidence failed to establish clear evidence of error. However, OWCP did not review the evidence submitted following its last merit review and did not make findings explaining the basis of its decision. As such, the Board is precluded from reviewing this decision.

The Board will therefore set aside OWCP's August 14, 2020 decision and remand the case for findings of fact and a statement of reasons, to be followed by an appropriate decision on appellant's untimely reconsideration request.

### **CONCLUSION**

The Board finds that the case is not in posture for decision.

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<sup>26</sup> See *Order Remanding Case*, Docket No. 20-0859 (issued November 20, 2020); *Order Remanding Case, C.G.*, Docket No. 20-0051 (issued June 29, 2020); *Order Remanding Case, T.P.*, Docket No. 19-1533 (issued April 30, 2020); see also 20 C.F.R. § 10.607(b).

<sup>27</sup> *Supra* note 22.

<sup>28</sup> *Supra* note 23.

<sup>29</sup> *Supra* note 24 at Chapter 2.1400.5.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 14, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 18, 2021  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board